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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 634

JOEL McDANIEL,
Petitioner,

vs.

CAMPBELL, WYANT & CANNON FOUNDRY COMPANY and MICHIGAN MUTUAL LIABILITY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
A. Chronology and Personal Data	4
B. Presentation of the Federal Question	5
Reasons for granting the writ	6
A. Historical Background of the Law	6
B. McDaniel's Case	9
C. Proposed Remedy	12
Conclusion	13
Appendix	i
A. Opinion of the Michigan Supreme Court	i
B. Order of the Michigan Supreme Court reversing the Michigan Workmen's Compensation Appeal Board	xii

TABLE OF AUTHORITIES CITED

Cases

	Page
Brown vs. Board of Education, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686	11
Carmichael vs. Southern Coal & Coke Co., 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868	11
Gauthier vs. Campbell, Wyant & Cannon Foundry Company, 360 Mich. 510, 104 N.W. 2nd 182 (1960)	6, 8
Great Atlantic & Pacific Tea Co. vs. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772	11
Harrison vs. Northern Trust Co., 317 U. S. 476, 87 L. ed. 407, 63 S. Ct. 361	12
Mills vs. T. B. Sanatorium, 323 Mich. 200, 35 N.W. 2nd 239 (1948)	9
Nashville C. & St. L. R. Co. vs. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486	11

CASES (CONT'D)

	Page
Quong Ham Wah Co. vs. Industrial Accident Commission, 184 Cal. 26; 192 P. 1021, 12 A.L.R. 1190, Writ of Error Dismissed, 255 U. S. 444, 65 L. ed. 723, 41 S. Ct. 373	13
Rueter vs. Rinshed Mason Co., 303 Mich. 550, 6 N.W. 2nd 887 (1942)	7
Tanner vs. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379	11
Tenement House Dept. vs. Moeschen, 179 N. Y. 325, 72 N.E. 231, Aff'd. 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781	12
The Delaware, 161 U. S. 459, 40 L. ed. 771, 16 S. Ct. 516	12
Vigeant vs. Postal Telegraph Cable Co., 260 Mass. 335, 157 N.E. 651, 53 A.L.R. 867	11
Woodword vs. DeGraffenreid, 238 U. S. 284, 59 L. ed. 1310, 35 S. Ct. 764	12

Constitution and Statutes

United States Constitution Amendment XIV, Sec. 1	2, 3, 5, 6
28 U. S. C. 1257 (3)	2
Michigan Workmen's Compensation Act (Michigan Compiled Laws of 1948, Sec. 411.1 et. seq., Michigan Statutes Annotated 17.141 et. seq.)	2, 3, 5, 6, 7, 9, 12
Amendments to Part VII, Sec. 4 of the Michigan Workmen's Compensation Act:	
Michigan Public Acts of 1937, No. 61	6
Michigan Public Acts of 1943, No. 245	2, 6, 9
Michigan Public Acts of 1945, No. 318	7
Michigan Public Acts of 1951, No. 278	7
1937 Michigan House Journal, Vol. 2	2
Michigan Public Acts of 1935, No. 164	7

Treatises

American Jurisprudence Vol. XII	11

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

(Numbers in parentheses followed by letter "a" indicate pages of the appendix of defendants-appellants filed in the Court below unless otherwise clearly identified. Lower case Roman numerals in parentheses indicate pages of the Appendix attached hereto)

Petitioner Joel McDaniel prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered September 7, 1962.

OPINIONS BELOW

The Award of the Hearing Referee of the Michigan Workmen's Compensation Department (8a, 9a) is unreported. The Opinion and Order of the Michigan Workmen's Compensation Appeal Board (11a, 13a) is not of-

ficially reported, but may be found at *1960 Mich. Workmen's Comp. Dept. Opinions on Review 691* (W. C. Opinions, Box 38 Alfred St. Sta., Detroit, Mich.). The Opinion of the Supreme Court of the State of Michigan (i) is reported at 367 Mich. 356.

JURISDICTION

The judgment of the Supreme Court of Michigan reversing the Appeal Board of the Michigan Workmen's Compensation Department and remanding the case to it for entry of a consistent order (xii) was dated and entered on September 7, 1962. The jurisdiction of this Court is invoked under 28 *U. S. C.* 1257 (3).

QUESTION PRESENTED

Does Part VII, Section 4 of the Michigan Workmen's Compensation Act (*Michigan Compiled Laws* of 1948, Section 417.4, *Michigan Statutes Annotated* 17.223) as construed by the Court below, operate to deprive petitioner of equal protection of the laws within the meaning of *Article* XIV of the *Amendments* to the *United States Constitution* in limiting the total amount of weekly compensation benefits payable to him for occupational silico-tuberculosis to $10,500, as contrasted to upwards of $28,500 payable for other types of occupational disabilities, where all of petitioner's exposure to the causes and conditions giving rise to the occupational disease occurred *after* the effective date of the Occupational Disease Amendments to the Michigan Workmen's Compensation Act (Act 245 of the *Public Acts* of 1943, *Michigan Compiled Laws* of 1948, Sec. 417.1 et seq., *Michigan Statutes Annotated* 17.220 et seq., effective date July 30, 1943)?

The Supreme Court of the State of Michigan reversed the Appeal Board of the Michigan Workmen's Compensation Department and held the answer to be "No." Petitioner respectfully contends that the answer should be "Yes" and seeks this writ of certiorari to review that holding.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. *United States Constitution, Amendment* XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Michigan Compiled Laws* of 1948, Section 417.4; *Michigan Statutes Annotated* 17.223, Part VII, Section 4 of the Michigan Workmen's Compensation Act:

> "Compensation shall not be payable for partial disability due to silicosis or other dust disease. In the event of temporary or permanent total disability or death from silicosis or other dust disease, notwithstanding any other provisions of this act, compensation shall be payable under this part to employees or to their dependents in the following manner and amounts: If disablement or death occurred during the first calendar month in which Act No. 61 of the Public Acts of 1937 became effective not exceeding the sum of $600.00; if disablement or death occurred during the second calendar month after such act became effective not exceeding the sum of $700.00; thereafter the total compensation and benefits payable for disability and death shall increase at the rate of $100.00 each calendar month. The aggregate amount payable shall be determined by the total amount payable in the month in which disablement or death occurs. In no event shall such compensation exceed an aggregate total of $10,500.00; Provided, That rights accruing prior to the effective date of this amendatory act shall be preserved and governed by the provisions of this section prior to the effective date of this amendatory

act: Provided, That where silicosis or other dust diseases were first made compensable by Act No. 245 of the Public Acts of 1943, then in such instances the graduated benefit provision of this section shall begin to apply to disability or death resulting from such diseases as of the effective date of such act."

STATEMENT OF THE CASE

A. Chronology and Personal Data.

Joel McDaniel, the petitioner, is a 35 year old married man with four dependent children. He commenced working for Respondent Campbell, Wyant & Cannon Foundry Company in Muskegon, Michigan in July of 1947 (14a). He was exposed to unusual and excessive amounts of free crystalline silica dust in his employment from that time until he became disabled by silico-tuberculosis on December 10, 1956 (14a) when Respondent Mich. Mutual Liability Co. was compensation insurance carrier. He was admitted to the Muskegon County (Michigan) Sanatorium on December 13, 1956 (2a, 3a), and remained there until he was released on September 17, 1958 to return to limited work, not in a foundry or other silica hazard, and for no more than 30 hrs. per week (15a, 56a, 57a).

An application for workmen's compensation benefits was filed (4a) and after hearing, the Hearing Referee found that McDaniel had sustained a compensable personal injury on December 10, 1956 and that he was a married man with four dependent children, and awarded him disability compensation at the rate of $57.00 per week from December 11, 1956 until December 17, 1957 and continuing thereafter until further order of the Workmen's Compensation Department, with the provision that such payment should not exceed the aggregate amount of $10,500 (8a, 9a). This award further provided that respondents should reimburse plaintiff for the use and benefit of the Muskegon County Sanatorium the sum of $11.68 per inpatient day during his period of hospitalization (9a).

The Workmen's Compensation Appeal Board entered an opinion and an order on November 10, 1960 affirming and modifying the award of the Referee by removing the $10,-

500 limitation and granting interest at the rate of 5% upon all compensation benefits past due from the due date thereof until payment is made (11a, 12a).

From this order respondents duly filed an application for leave to appeal to the Supreme Court of Michigan, which application was granted (75a).

After briefing and oral argument on two occasions, the Supreme Court of Michigan filed its Opinion dated September 5, 1962 (i), holding *inter alia* that the $10,500 limitation on aggregate compensation payable in cases of silicosis or other dust disease did apply to petitioner, and as so applied, did not constitute a denial of the equal protection of the laws guaranteed by Article XIV of the Amendments to the Constitution of the United States. Its Order reversing and remanding for consistent proceedings was entered on September 7, 1962 (xii).

B. Presentation of the Federal Question.

A violation of Article XIV of the Amendments to the Constitution of the United States was first asserted by petitioner in his cross-application for review of the award of the Hearing Referee insofar as it limited the amount of total weekly compensation payable to the sum of $10,500.00 (10a). The Federal Question was next presented by the Michigan Compensation Appeal Board in its opinion (34a, 35a) in its holding that Part VII, Section 4 of the Michigan Workmen's Compensation Law which limits the aggregate of weekly benefits payable in a silicosis or other dust disease to $10,500.00 is not applicable to plaintiff in the case at bar, since if it were construed to be applicable to plaintiff's case it would violate Article XIV of the Amendments to the Constitution of the United States. This construction of the statute was protested by respondents in their application for leave to appeal (48a) and the Supreme Court of Michigan specifically held that the statute in question as applied to McDaniel's case "does not involve a denial of equal protection of the laws" (iv).

REASONS FOR GRANTING THE WRIT

The Michigan Workmen's Compensation Act, Occupational Disease provisions, have not been construed by this Court in the light of the Fourteenth Amendment. The construction of the Supreme Court of Michigan affects adversely a large segment of Michigan workers, miners and foundrymen, and may be used to support other obsolete and invidious distinctions among workmen's compensation claimants throughout the United States.

A. Historical Background of the Law.

The historical background of the enactment in Michigan of the various legislative Acts relating to the compensability of silicosis and other dust diseases is relevant to an examination of the problem herein involved. A complete statement of this history is found in *Gauthier vs. Campbell, Wyant & Cannon Foundry Company*, 360 Mich. 510, 104 N.W. 2nd 182 (1960) and is here summarized for convenience.

Although the first Michigan Workmen's Compensation Act was passed in 1912, no compensation was provided for occupational diseases until Part VII was added to the Act by *Public Acts* of 1937, No. 61 (effective October 29, 1937), which provided compensation only for the particular occupational diseases listed in an attached schedule, among which was silicosis as a result of mining, pneumoconiosis which resulted from quarrying, cutting, grinding or polishing of metal, stoneworkers or grinders' phthisis and other provisions. Compensation for disablement from "silicosis or other dust disease" occurring in the first month after the effective date of this Act was limited to $500 with an additional $50 added for each additional month of exposure before disablement or death, up to a maximum of $3,000.

Public Acts of 1943, No. 245 (effective July 30, 1943) eliminated the occupational disease schedule and provided that *any disabling occupational disease* should be treated as are other personal injuries under the Act. Thus silicosis or pneumoconiosis was covered, however acquired;

for example, in general foundry work as was the case with the petitioner, McDaniel.

The same stepladder method of determining maximum benefits payable was likewise applied to diseases first made compensable by the 1943 Amendment (supra p. 3) although the dollar amounts were raised; hence, a general foundry laborer disabled during the first month after the effective date of the 1943 Amendment was entitled to $600 in total compensation with an additional $100 for each additional month of exposure before disablement or death. The maximum was increased by this Act to $4,000. *Public Acts* of 1945, No. 318 (effective 5 28 45) raised the maximum to $6,000. *Public Acts* of 1951, No. 278 (effective 6 29 51) raised the maximum to $10,500 where it remains to this day.

This stepladder approach to compensation was first proposed in the report of a special Commission of Inquiry created by statute (*Public Acts* of 1935, No. 164 (effective 9/21/35), to investigate and recommend the proper approach to compensation for occupational disease. This report recommended compensation coverage for silicosis and other dust disease but sharply limited in scope (1937 Michigan House Journal, Volume 2, pages 159, 160, quoted in *Rueter vs. Rinshed Mason Co.*, 303 Mich. 550, 6 N.W. 2nd 887 (1942)):

> " 'The matter of accrued liability arises. We mean that when the act becomes effective there will be workmen who will have been exposed to an occupational disease for quite some time, perhaps years, before the act becomes effective, and disability may result within a very short period of time after the act becomes law. We recommend that the provisions of the New York act be followed: namely, if disability or death occurs during the first calendar month in which the act becomes effective, total compensation to be paid should be limited to $500; if either occurs during the second calendar month, the amount to be paid should not exceed $550, and thereafter, the total of compensation payable for disability or death should increase at the rate of $50 for each calendar month until the limits provided in the compensation act for accidents be reached, excepting that in cases of dis-

> ability or death due to silicosis and other dust diseases the maximum should be $3,000.' "

The recommendation of the Commission of Inquiry was followed by the Legislature in all respects.

The explicit purpose of the statutory scheme was to insulate the employers in the dusty trades against the consequences of employee disablement occurring shortly after the effective date of the Act caused largely by previous exposure to dust hazards. The method chosen was to limit sharply the amount of compensation payable to employees whose disability or death occurred shortly after the effective date of the Act, increasing it by a small amount for each succeeding month of work in exposed employment. The Legislature's fear was that unless such a stepladder approach was adopted, the cost of compensation insurance might be such as to force certain industries out of the state and render workers in those industries unemployed.

This legislative history, the supporting reasoning, and the bitter consequences for the affected workers was lucidly and thoroughly discussed by the Michigan Supreme Court in *Gauthier vs. Campbell, Wyant & Cannon Foundry Company*, 360 Mich. 510, 104 N.W. 2nd 182 (1960). The Michigan Supreme Court there described the legislative purpose in explicit terms:

> "The legislative scheme as exemplified in the silicosis amendments included both monthly gradations and overall maximum limitations on benefits designed to lessen the economic impact on industry of accumulated exposure." (523).

In *Gauthier* the Michigan Supreme Court declined to hold that there was "no rational basis for the legislative scheme which Michigan actually adopted" (522) as to a worker who acquired his silicosis by reason of exposure to silica dust over the period 1924 to 1947 on the ground that Gauthier by reason of 19 years' exposure prior to the 1943 amendments to the Compensation Act, did actually present a case of "accrued liability."

B. McDaniel's Case.

No question of accrued or accumulated liability arises with respect to McDaniel since he was first employed in a dust hazard on July 7, 1947, nearly four years after the effective date of the 1943 Amendment which made this disease acquired in this occupation compensable. Yet McDaniel has been confined to the maximum benefits provided under the statute for silicosis or other dust disease, $10,500, just as if he did in fact represent an instance of accrued and accumulated liability.

Had McDaniel suffered an injury to his back or leg, or an injury to his lungs through noxious gas, or the identical disease, tuberculosis, through occupational contagion (*Mills vs. T. B. San.*, 323 Mich. 200, 35 N.W. 2nd 239 (1948), his maximum entitlement to weekly benefits in his dependency classification would be $28,500 (500 weeks times $57 per week) plus permanent and total disability weekly benefits thereafter, if applicable. (Michigan Workmen's Compensation Act, Part II, Sections 9 and 10, *Michigan Compiled Laws* of 1948, Sections 412.9, 412.10, *Michigan Statutes Annotated* 17.159, 17.160). Disabled by dust disease, McDaniel can receive no more than $10,500, irrespective of the duration or extent of his disability or the number of his dependents.

The unequal operation of the statute is thus clear. The basis upon which the Legislature made the statute unequal: that is, a fear that employers in the dusty trades would be heavily penalized because of accrued or accumulated liability is also clear. And the fact that this reasoning cannot apply to McDaniel since he was never employed in the hazard before the effective date of the Occupational Disease Amendment in 1943 is equally clear.

Faced with these unequivocal circumstances, the Michigan Workmen's Compensation Appeal Board held that the Legislature cannot have intended its limitation upon the amount of maximum compensation payable to apply to McDaniel and other persons whose injurious exposure commenced after the effective date of the 1943 Act, because to construe the limitation to apply to McDaniel would be to render it unconstitutional as a denial of equal protection of the laws (32a-35a).

The Michigan Supreme Court below reversed this holding of the Workmen's Compensation Appeal Board, asserting in its opinion that although the legislative intent in providing the stepladder approach was in fact the problem of accrued or accumulated liability, which did not exist with respect to McDaniel, there might be other justifications for confining him to a measure of weekly compensation, substantially less than half that enjoyed by workers whose disabilities arise under other circumstances.

The Michigan Supreme Court felt that its duty lay, despite the clear obsolescence of the Legislature's stated purpose, in seeking some "conceivable" basis for the disparity in treatment of McDaniel:

> "It is enough if a state of facts can be conceived which would form a reasonable basis for the classification" (iii).

Acting pursuant to this self-imposed duty, the Michigan Supreme Court reviewed certain publications quoted in respondent's brief below and concluded that non-discriminatory treatment for silicosis:

> "might conceivably involve financial risks and burdens so confiscatory as to drive them [dust-hazard industries] out of business or out of the state * * *" (iv).

We believe that the Michigan Supreme Court grievously erred in its inferences from the incomplete quotations from the cited publications but do not argue this point here. A much more fundamental error in our view is found in the Michigan Supreme Court's rejection of the Workmen's Compensation Appeal Board's position that the reason for the legislative classification having become obsolete and inapplicable as to McDaniel, that classification constitutes a denial of equal protection of the laws to McDaniel if the statute is so construed as to embrace him in its scope.

There is no question but that a statute originally constitutional at the time of its enactment may, through passage of time and alteration of circumstances, become an unconstitutional deprivation of equal protection of the laws.

Brown vs. Board of Education, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686; *Nashville C. and St. L. R. Co. vs. Walters*, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486. And see *Vigeant vs. Postal Telegraph Cable Co.*, 260 Mass. 335, 157 N.E. 651, 53 *A. L. R.* 867 and cases cited therein.

The Court below held, and we concede, that as a general proposition a statute must be presumed to be constitutional, and that statutory classifications will be held to be reasonable if a state of facts can be conceived which would justify them. But we respectfully submit that the reasonableness of the classification imposed by statute must always be judged in terms of the Legislature's *purpose* in making it. 12 *Am. Jur. Constitutional Law*, Section 481 (p. 153):

> "The precept most often employed states that a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object, act, or persons in respect to which it is proposed."

Citing *Carmichael vs. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868; *Great Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, and numerous other cases.

A determination of the *purpose* of the enactment is of the very essence of a determination of the reasonableness of the classification employed, and differences which may constitute a valid classification for some purposes furnish no reason whatever for classification for other purposes:

> "Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct, depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation."

Tanner vs. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379.

In few cases is a reviewing Court favored, as it is in the case at bar, with an explicit and authoritative contemporaneous statement of the plan for legislation and the reason for the plan, adopted *in toto* by the Legislature so that the intent and purpose of the legislation is beyond question. The report to the legislature of the legislatively-created Commission of Inquiry may, of course, be considered in determining the intent of the recommended legislation. See generally *Harrison vs. Northern Trust Co.*, 317 U. S. 476, 87 L. ed. 407; 63 S. Ct. 361. This rule has specific reference to resort to the reports of special commissions, if the recommendations are followed, to determine the purpose and intent of the legislation. *Woodward vs. De-Graffenreid*, 238 U. S. 284, 59 L. ed. 1310, 35 S. Ct. 764; *The Delaware*, 161 U. S. 459, 40 L. ed. 771, 16 S. Ct. 516; *Tenement House Dept. vs. Moeschen*, 179 N. Y. 325, 72 N.E. 231, Affirmed 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781.

We contend that the Michigan Supreme Court had no warrant nor reason to extend the "conceivable" purpose of the Legislature beyond that which was expressly stated: the prevention of financial burdens upon employers in the dusty trades by reason of accrued or accumulated liability.

Thus, we respectfully submit that the purpose for which this law was enacted is the only method by which the validity of its classification can be judged; and the only valid inquiry is, "Is McDaniel in that class of persons whom the Legislature judged should have their rights to compensation curtailed by reason of the problem of accrued liability?" The answer is plain: he is not. The fact that the Legislature might, if it were sitting today in consideration of this matter, enact a similar statute for a completely different purpose does not bear, we submit, upon the validity of the classification as applied to McDaniel.

C. Proposed Remedy.

The only practicable remedy which we can propose to this erroneous action of the Michigan Supreme Court is that the limitation upon total benefits payable for silicosis or other dust diseases contained in Part VII, Section 4 of the Michigan Workmen's Compensation Act should be de-

clared to be invalid as a denial of equal protection of the laws as applied to a worker whose exposure in the dusty trades commenced after July 30, 1943. Invalidity of an exclusionary provision of a state workmen's compensation act because of denial of equal protection of the laws results in the injured worker becoming entitled to the full benefits of the statute. *Quong Ham Wah Co. vs. Industrial Accident Commission*, 184 Cal. 26; 192 P. 1021, 12 *A. L. R.* 1190, Writ of Error dismissed 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373. We suggest that such a remedy is here appropriate and seek certiorari to that end.

CONCLUSION

For the foregoing reasons, it is requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 19, 1962.

(Appendix follows).

OPINION OF THE MICHIGAN SUPREME COURT
(Filed September 7, 1962)

STATE OF MICHIGAN
SUPREME COURT
OCTOBER TERM 1961

JOEL MCDANIEL,
Plaintiff and Appellee,
vs.
CAMPBELL, WYANT & CANNON FOUNDRY COMPANY and MICHIGAN MUTUAL LIABILITY COMPANY,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

DETHMERS, J.

Defendants appeal from what they apparently deem to be, inter alia, an overruling by the workmen's compensation appeal board of this Court's decision in Gauthier vs. Campbell, Wyant & Cannon Foundry Company, 360 Mich. 510. In that case Mr. Justice Edwards wrote for the entire Court, in part, as follows:

"This appeal seeks to have this Court declare unconstitutional the statutory maximum limitation now placed upon workmen's compensation for industrial silicosis victims. • • •

"The constitutional provisions relied upon by appellant are:

"'No State shall • • • deny to any person within its jurisdiction the equal protection of the laws.' U. S. Const. am. 14, §1, • • •

"• • • the inequality complained of is that the maximum set for victims of death or disability due to silicosis

is a different and lower maximum than that set for death or disability resulting from other compensable injuries or diseases. Hence, appellant argues that she is the victim of an arbitrary and unreasonable classification. * * *

"The legislative scheme as exemplified in the silicosis amendments included both monthly gradations and overall maximum limitations on benefits designed to lessen the economic impact on industry of accumulated exposure.

"This was recognized in the portion of the opinion of the appeal board upon which appellant depends:

" 'The limitation in section 4 arose out of the original fear of accrued liability in dust disease cases. The special treatment of such cases was certainly reasonable in the beginning. However, more than 21 years have passed since that time. Without question the purpose of the limitation is obsolete.' "

"In this case, we deal with a compensation claim based upon an employment of 23 years' exposure to silica dust in a foundry. * * * For 19 of these years of exposure, there was no law which provided any form of recovery for the disease which ultimately killed decedent as to the occupation in which he was employed. * * *

"Decedent worked for 4 years after passage of the statute which first gave him any protection."

"Any argument that the scheme is now 'obsolete' as to future disabilities must wait consideration on a record which presents some facts from which it might be deduced that the legislative reasoning had lost all value with passage of time and change of circumstances."

Plaintiff-appellee says, and the appeal board held, that this is the case presenting such a record, because all of his 9 years of exposure to silica dust in defendant's or any employment occurred after the effective date of P. A. 1943, No. 245, thus involving no problem of accrued liability, and that, therefore, application, as in Gauthier, of the $10,500 maximum fixed by C. L. S. 1956, §417.4 (Stat. Ann. 1960 Rev. §17.223) to plaintiff's case would constitute a denial of equal protection of the laws and hence be unconstitutional.

In essence, plaintiff says that in Gauthier this Court recognized a basis (accrued liability antedating the statute) for the classification rendering it and the limit reasonable there but that that basis is lacking as applied to the facts in the case at bar, and that, accordingly, the limit is unreasonable and unconstitutional, if held applicable to his claim. This presupposes that the classification has no support in reason other than that stated in Gauthier. Defendants urge others, however, which plaintiff brushes aside as merely "fascinating." Plaintiff seems to suggest that if the reasons which would justify the classification in a particular case are not the ones of which the legislature can be shown to have been thinking at the time it made the classification, then the latter must fall when the reason the legislature did have in mind is insufficient for that case. There is no support for this doctrine. It is enough if a state of facts can be conceived which would form a reasonable basis for the classification. Naudzius vs. Lahr, 253 Mich. 216; Miller vs. Detroit Savings Bank, 289 Mich. 494. These cases and others hold, as well, that the burden rests on the party assailing it to prove the absence of a reasonable basis therefor. What has plaintiff proved in that respect? The most he claims to have shown is that his exposure began after enactment of the remedial statute and that, as he contends, there is, therefore, no factor or problem of accrued liability in his case to justify the classification and $10,500 limitation.

What are some factual bases, other than that of accrued liability, which defendants say reasonably can be conceived to sustain the classification?

1. Exposure to silicosis and other dust diseases is limited to a relatively narrow segment of industry, consisting largely of mining, quarrying, cutting, grinding and polishing of metal, and foundry work. To this effect, see opinion in Gauthier, pp. 520-522, quoting from 1 Larson, The Law of Workmen's Compensation, §41.20, and from the governor's commission of inquiry (House Journal, 1937, pp. 158-160 [Michigan]). See, also, September, 1958 issue of Public Health Reports, published by the United States department of health, education and welfare, Vol. 73, No. 9, pp. 839-842, disclosing results of a cost

study by the occupational health program of the United States public health service. It shows that for the years 1950 to 1955, two-thirds of the discovered cases of silicosis were associated with mining and quarrying, 16% with foundry work, and 18% with pottery, stone, silica brick, tile, clay and glass industries. Defendants urge that this concentration on relatively few industries of the insurance cost for care and compensation for persons affected with such diseases might conceivably involve financial risks and burdens so confiscatory as to drive them out of business or out of the State whose laws provide for but place no limit on such compensation. This was noted by Larson, in the quotation in Gauthier, with respect to the monument industry in Wisconsin, where statutorily imposed full coverage, without limits, caused the insurance premium for monument workers to soar higher than the payroll itself, with the result that the entire industry was closed down.

2. As appears from the above mentioned cost study and published report thereof (see pp. 844-845) average compensation costs, per case, for silicosis, run far higher than in compensation cases generally; and, further, silicosis accounts for a very high percentage (one-third to 90%) of all occupational diseases. From these factors, the report concludes with respect to limits in compensation laws in cases of silicosis, that:

"If restrictions in laws were lifted, the costs would undoubtedly skyrocket to unforeseen proportions." (p. 845).

3. Workers affected by silicosis are more readily employable in other occupations, where there is no exposure to dust, than is true with workers suffering from other compensable injuries or disabilities.

We think these come within the Naudzius characterization of reasonably conceivable facts which would and do sustain the statutory classification and limitation. The statutory imposition of a $10,500 limit on silicosis and dust disease cases, even though not made applicable to other cases of compensable disability, represents a classification which is reasonable. It does not involve a denial of equal

protection of the laws. We hold it constitutional as applied to the facts at bar as we did to those in Gauthier. That the legislature intended it to apply in both situations cannot be doubted from the language of the statute.

Defendants also contend that the appeal board erred in granting plaintiff reimbursement from defendants for the use and benefit of the Muskegon County Sanatorium for the cost of his hospitalization there, which plaintiff had not paid and for which he had not been charged. C. L. S. 1956, §412.4 (Stat. Ann. 1960 Rev. §17.154) provides:

"The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this state as legal, when they are needed * * * *If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission.*" (Emphasis supplied).

Defendants quote from section 3a of the so-called tuberculosis statute, C. L. 1948, §329. 403a (Stat. Ann. 1956 Rev. §14.363[1]), as follows:

"Expenditures of public funds for the treatment or control of tuberculosis or for the treatment; isolation or control of persons afflicted with tuberculosis, *shall be considered expenditures for the protection of the public health*, and not as moneys advanced in the nature of welfare or relief. *No person shall be under legal obligation to make reimbursement for such expense so incurred*, unless the state commissioner of health and the county of settlement, after reasonable notice and upon fair hearing under rules of procedure to be determined by the state commissioner of health, shall have found that the person so hospitalized or treated, or the person or persons legally liable for his support, are possessed of sufficient income or estate to enable them to make such reimbursement in whole or in part without materially affecting their reasonable economic security or support, in the light of their respective re-

sources, obligations, and responsibilities to dependents. *No such order shall be made retroactive unless* said state commissioner of health and the county of settlement shall find that the person to be charged has been guilty of misrepresenting or withholding knowledge of facts material to the issue. Receipts under any such order, and moneys voluntarily paid as reimbursement, shall be distributed pro rata to the funds out of which the expenditures were made." (Emphasis supplied).

Defendants then say that the State commissioner of health has not conducted a hearing or made an order as specified in the last above statutory quotation, and conclude that, therefore, as provided therein, "no person shall be under legal obligation to make reimbursement for such expense so incurred" in the county sanatorium for plaintiff's treatment and care. Hence, say defendants, the above quoted language from the workmen's compensation act that the "employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing" medical and hospital services "by an award of the commission" has no application here because plaintiff has incurred no expense, has not been charged for such service, is not obligated to make reimbursement, and has paid nothing for it, and so there is nothing for which plaintiff can be reimbursed. They urge that it would be a misnomer to call payment therefor to him, under such circumstances, reimbursement when it would really amount to a windfall. The statute seems, however, to use the word in no technical sense, because it expressly provides that a plaintiff shall be "reimbursed" not only when the expense is incurred by him, but even when incurred on his behalf.

We think the expense in question, incurred by the sanatorium on plaintiff's behalf, comes within the meaning of the reimbursement provision of the compensation statute. It provides for reimbursement of plaintiff. True, the statute does not make express provision for such reimbursement to plaintiff for the use and benefit of another, such as the sanatorium which incurred the expense on plaintiff's behalf. If, however, the appeal board sees fit to place such strictures on the reimbursement due plaintiff from de-

fendants, we see no reason for complaint on the part of defendants who must pay at all events. It cannot much concern them who receives the benefit as between plaintiff and the sanatorium. Certainly public policy or legislative intent as expressed in either act can hardly be said to be offended if the effect of the award is to cause reimbursement of the institution which provided the care for plaintiff. In fact, it accomplishes directly what the above quoted provision in the so-called tuberculosis statute contemplates by the less direct method of proceedings at the instance of the State commissioner of health. Even if it be conceded that plaintiff is not liable under the tuberculosis statute, the fact is not thereby obviated that the sanatorium incurred the expense on his behalf, for which defendants are bound to make reimbursement, that is payment, under the compensation statute.

Finally, defendants raise the question whether, under this Court's decision in Wilson vs. Doehler-Jarvis Division of National Lead Company, 358 Mich. 510, interest should be added to the award, as the appeal board did in this case. On December 16, 1958, the hearing referee found that plaintiff sustained a compensable personal injury on December 10, 1956, and awarded compensation, subject to the $10,500 limitation, but without interest. Defendant filed application to the appeal board for review. Plaintiff filed cross-application for review as to the $10,500 limit, but neither party raised or requested review of the interest question. On November 10, 1960, the appeal board entered its order affirming the award of compensation but modifying it by eliminating the $10,500 limitation and providing, sua sponte, for interest on all past due benefits at 5% per annum from due date till paid. In Wilson vs. Doehler-Jarvis the plaintiff was injured in January of 1951, resulting in his disablement in August of 1952 and his death in February of 1955. In May of 1954 he had filed application for hearing and adjustment of claim. Hearing was commenced in September of 1954. Plaintiff died in February of 1955 and in March application was filed on behalf of his dependents for death benefits. In February of 1956 the hearing referee granted compensation and in October of 1956 the appeal board entered its order grant-

ing compensation. This was affirmed by this Court July 15, 1958 (353 Mich. 363). It is since the latter date that all of the proceedings in the instant case occurred. Plaintiff's disablement in this case on December 10, 1956, followed by 10 months the hearing referee's award to plaintiff Wilson's dependents and by 2 months the appeal board's affirmance in that case. Query well, should interest allowed Wilson's dependents be denied on this plaintiff's compensation when his disability and award came after the referee's and appeal board's award in Wilson, merely because the date when this Court affirmed, with modifications, the circuit judge's allowance of interest in Wilson came later (January 4, 1960) than the date of this plaintiff's injury and disablement?

That question projects into the foreground the statement in the opinion of the majority of this Court, in approving interest, in Wilson vs. Doehler-Jarvis, 358 Mich. 510, that, "This decision shall not, however, be regarded as retroactive." What was meant by that language.

Plaintiff suggests that the members of this Court signing the opinion containing that language meant thereby simply to insure that the decision should not occasion reopening of cases in which interest had not been allowed and which already had been closed on the date of that opinion. Such construction, at all events, appears to pose no constitutional difficulties.

Defendants insist, however, that the express denial, in Wilson, of retroactive effect for the new holding allowing interest, should be read in the light of the language of the majority of the 7 members of this Court participating in the decision in Parker vs. Port Huron Hospital, 361 Mich. 1, in which note is taken of the fact that "It has been suggested, in the event this Court were to overrule the immunity exception, that it should do so on a prospective basis * * *" to which, in that same opinion, the response is made, "we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of filing of this opinion." That, say defendants, should apply here, as relates to the new Wilson holding on interest. That is not the view expressed in the 2-man dissent in Jochin vs. City of Saginaw,

363 Mich. 648, written by the writer of the 4-man majority opinion in Parker. It interpreted the mentioned language in Wilson against retroactivity as above suggested by plaintiff.

Not having joined in the majority opinion in either Wilson or Parker, and remaining unpersuaded still that it is or was within the judicial province, in Wilson, to amend the compensation statute to make it provide for interest, nevertheless, if the law now be as therein pronounced and I am confronted with the necessity of applying either or both of those majority opinions, then I must conclude that plaintiff's construction of the questioned sentence in Wilson should be adopted. When new law comes into being by legislative enactment susceptible of two different interpretations, one producing a constitutional result and the other one which would be unconstitutional, it is a rule of statutory construction to adopt that which squares with constitutionality, on the presumption that the legislature intended to do and accomplish that which is constitutional. Sullivan vs. Board of Dentistry, 268 Mich. 427, and cases cited therein. Ought not law created by this Court to be accorded equal deference and presumption of constitutionality? For this Court to announce in Wilson, on January 4, 1960, that the old law as stated in Fowler vs. Muskegon County, 340 Mich. 522, which denied that plaintiff the right to interest on workmen's compensation benefits, was then being overruled and that under the new or true law plaintiff Wilson was entitled to such interest, but now, in 1962, without overruling Wilson but, in fact, professing that it is still the law, to say to plaintiff McDaniel that his claim for like interest, to which he would be entitled under that present law, is denied because his cause of action for compensation accrued before this Court spoke on the interest question in Wilson, is to deny plaintiff McDaniel equal protection of the laws. On January 4, 1960, a majority of this Court declared the law to be that plaintiffs are entitled to interest on workmen's compensation benefits from due date until paid. Until that law is overruled by this Court it cannot, constitutionally, fail to apply it to cases coming before it, absent some intervening statute to the contrary.

unless it confesses the error in that case and recognizes Fowler anew.

Accordingly, plaintiff's interpretation of the indicated sentence in the opinion in Wilson should be adopted, if for no other reason, to permit the opinion and law therein announced to bear the stamp of constitutionality, at least insofor as "equal protection of the laws" is concerned.

Affirmed in part and reversed in part, as above indicated, and remanded for entry of an order consistent herewith. No costs, neither party having prevailed in full.

Eugene F. Black,
Thomas M. Kavanagh,
Concurred in result.

Paul L. Adams,
Concurred with Dethmers, J.

STATE OF MICHIGAN
SUPREME COURT

JOEL MCDANIEL,
Plaintiff and Appellee,

vs.

CAMPBELL, WYANT & CANNON FOUNDRY COMPANY and MICHIGAN MUTUAL LIABILITY COMPANY,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

SOURIS, J. (concurring in affirmance in part, reversal in part).

I am not persuaded plaintiff has borne his burden of proving the absence of a reasonable basis for the maximum limitation appearing in our workmen's compensation act upon benefits paid for death or disability resulting from industrial silicosis. Nor do I believe that defendants, distinguished from plaintiff, are in any position to

complain about the appeal board's order granting plaintiff reimbursement of medical expenses for the use and benefit of the County Sanatorium, which incurred those expenses in plaintiff's behalf. Finally, the appeal board's award of interest upon all past due benefits from due date until paid was correct for the reasons I set forth in my opinion in the case of Drake vs. Norge Division of Borg Warner Corporation, ... Mich. .....

For the foregoing reasons, I concur in the disposition made of this case by Mr. Justice Dethmers.

STATE OF MICHIGAN
SUPREME COURT

JOEL McDANIEL,
Plaintiff and Appellee,
vs.
CAMPBELL, WYANT & CANNON FOUNDRY COMPANY and MICHIGAN MUTUAL LIABILITY COMPANY,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

CARR, J.

For the reasons set forth in the dissenting opinion in Wilson vs. Doehler-Jarvis Division of National Lead Company, 358 Mich. 510, 519, we cannot agree that interest should be allowed in the instant case on the award of compensation in plaintiff's favor. The rights and obligations of the parties in a proceeding of this nature rest wholly on the statute. The legislature has not seen fit to provide in the workmen's compensation law that awards thereunder shall draw interest. The issue of public policy in this respect was and is a matter for legislative determination.

With respect to the other questions involved in the case at bar, we are in accord with the conclusions reached by Justice Dethmers in his opinion.

Harry F. Kelly,
Concurred with Carr, C.J.

ORDER OF THE MICHIGAN SUPREME COURT REVERSING THE MICHIGAN WORKMEN'S COMPENSATION APPEAL BOARD

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of September in the year of our Lord one thousand nine hundred and sixty-two.

Present the Honorable

LELAND W. CARR,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
THEODORE SOURIS,
OTIS M. SMITH,
PAUL L. ADAMS,
Associate Justices.

JOEL MCDANIEL,
Plaintiff,
vs. 49191
CAMPBELL, WYANT & CANNON FOUNDRY COMPANY, et al.,
Defendants and Appellants.

This cause having been brought to this Court by appeal from the Workmen's Compensation Appeal Board, and having been argued by counsel, and due deliberation had

thereon, it is now ordered by the Court, that the order of the appeal board be and the same is hereby affirmed in part and reversed in accordance with the opinion filed herein, and remanded for entry of an order consistent with said opinion. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN — SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing this 17th day of September in the year of our Lord one thousand nine hundred and sixty-two.

Donald F. Winters,
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 634

JOEL McDANIEL, *Petitioner,*

v.

CAMPBELL, WYANT & CANNON FOUNDRY COMPANY AND MICHIGAN MUTUAL LIABILITY COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	4
Argument	4
Conclusion	6

CITATIONS

McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)	5
Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]

JOEL McDANIEL, *Petitioner*,

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CAMPBELL, WYANT & CANNON FOUNDRY COMPANY AND MICHIGAN MUTUAL LIABILITY COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The award of the Hearing Referee of the Michigan Workmen's Compensation Department (8a, 9a)* is

* Numbers in parentheses followed by the letter "a" indicate pages of petitioner's appendix filed in the Court below. Lower case Roman numerals indicate pages of the appendix to the petition filed in this Court.

unreported. The opinion and order of the Appeal Board of that department (11a, 13a) is not officially reported, but may be found in 1960 Workmen's Compensation Department Opinions on Review, p. 691, published by Workmen's Compensation Opinions, P.O. Box 38, Alfred Street Station, Detroit, Michigan. The opinion of the Supreme Court of Michigan (i) is reported at 367 Mich. 356.

JURISDICTION

The jurisdictional requisites are set forth in the petition, at page 2.

QUESTION PRESENTED

Whether the 14th Amendment to the United States Constitution is violated by that provision of the Michigan occupational disease statute which establishes $10,500 as the maximum to be awarded for death or disability from silicosis or other dust disease, without fixing a like maximum in cases involving other forms of occupational disease.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The 14th Amendment to the United States Constitution is as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Part VII, § 4, of the Michigan Workmen's Compensation Act (Comp. Laws 1948, § 417.4, Stat. Ann., § 17.223) is as follows:

> "Compensation shall not be payable for partial disability due to silicosis or other dust disease. In the event of temporary or permanent total disability or death from silicosis or other dust disease, notwithstanding any other provisions of this act, compensation shall be payable under this part to employees or to their dependents in the following manner and amounts: If disablement or death occurred during the first calendar month in which Act No. 61 of the Public Acts of 1937 became effective not exceeding the sum of $600.00; if disablement or death occurred during the second calendar month after such act became effective not exceeding the sum of $700.00; thereafter the total compensation and benefits payable for disability and death shall increase at the rate of $100.00 each calendar month. The aggregate amount payable shall be determined by the total amount payable in the month in which disablement or death occurs. *In no event shall such compensation exceed an aggregate total of $10,500.00*; Provided, That rights accruing prior to the effective date of this amendatory act shall be preserved and governed by the provisions of this section prior to the effective date of this amendatory act: Provided, That where silicosis or other dust diseases were first made compensable by Act No. 245 of the Public Acts of 1943, then in such instances the graduated benefit provision of this section shall begin to apply to disability or death resulting from such diseases as to the effective date of such act."

The italicized sentence is the crux of this case. The graduated benefit provisions are not involved, petitioner's disability having occurred at a time when he was entitled to the $10,500.00 maximum.

STATEMENT

Petitioner Joel McDaniel was employed by respondent Campbell, Wyant & Cannon Foundry Company of Muskegon, Michigan. In 1956, he became disabled from silicosis and applied for workmen's compensation. The Hearing Referee awarded compensation in the amount of $57.00 per week, with a maximum of $10,500.00.

The Michigan Workmen's Compensation Appeal Board modified this award by removing the $10,500.00 limitation.

The Supreme Court of Michigan reversed the decision of the Appeal Board. On remand, the Appeal Board was in effect directed to reinstate the $10,500.00 limitation.

ARGUMENT

In the petition for a writ of certiorari, the only basis advanced for the granting of the writ is that the decision of the Supreme Court of Michigan was in error.

On the contrary, the decision of that Court was clearly correct.

The question before that court was whether the Michigan legislature could put claims for death or disability from silicosis or other dust diseases in a class by themselves and limit the amount recoverable on such claims, without imposing a like limitation on claims for compensation arising out of other forms of occupational disease.

In its opinion, the Michigan court stated that the test for the validity of such a classification was whether a state of facts could be conceived which would form a reasonable basis for such classification.

This is the proper test. In *McGowan* v. *State of Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 387 (1961), this Court said:

> "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Michigan court then stated three peculiar aspects of silicosis and other dust diseases which, in its opinion, justified the legislature in imposing a special limitation on the recovery to be allowed in such cases. These three peculiar aspects are:

1. That exposure to silicosis and other dust diseases is limited to a relatively narrow segment of industry, which, in the absence of a limitation on the amount recoverable in such cases, might make the cost of compensation insurance prohibitively expensive for the few industries involved;

2. That silicosis accounts for a very high percentage of all occupational diseases, which, if recovery therefor was not limited, might cause the costs of compensation insurance generally to increase greatly; and

3. That workers affected by silicosis are more readily employable in other occupations, where there is no exposure to dust, than is true of workers suffering from other compensable injury or disease.

Surely these peculiar aspects of silicosis and other dust diseases form a reasonable basis for placing claims for death or disability resulting therefrom in a class by themselves.

But, argues the petitioner, these were not in fact the reasons for which the Michigan legislature originally enacted the limitation on the amount recoverable in

silicosis cases. He says that the real reason was something else, to protect employers from the hazard of accrued liability at the time the statute first took effect, a hazard which has since been eliminated by the passage of time.

Assuming this to be true, the validity of the statutory Classification is not thereby affected. If the classification is justifiable on the basis of any reasoning, this Court has said that it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Flemming* v. *Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted.

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